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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SAMISONI TAUKITOKU,)	
)	
Petitioner,)	
)	3:16-cv-00762-HDM-WGC
v.)	
)	
TIMOTHY FILSON, et al.)	ORDER
)	
Respondents.)	
)	
_____)	

This counseled habeas matter comes before the court on petitioner's renewed motion for discovery (ECF No. 20). Respondents, for the most part, do not oppose (ECF No. 21). Petitioner has filed a reply (ECF No. 22).

By way of his discovery motion, petitioner seeks to obtain from the Washoe County District Attorney's Office all materials that were disclosed to defense counsel in advance of or during petitioner's trial. Petitioner has been unable to obtain these materials from prior counsel. Petitioner asserts that discovery is necessary to develop three claims in his petition: (1) Ground Three, which asserts that trial counsel was ineffective for failing to present rebuttal witnesses to the State's prior bad act evidence; (2) Ground Four, which alleges that trial counsel was ineffective for failing to investigate the case; and (3) Ground Eight, which asserts that

1 petitioner's right to due process and a fair trial was violated when
2 the trial court denied the defense's request to continue trial after
3 voluminous disclosures were made on the eve of trial.

4 Respondents essentially do not oppose but ask the court to
5 require petitioner to first subpoena his former attorneys in order to
6 compel a thorough search for the documents before burdening the
7 District Attorney. Respondents also ask that petitioner be required
8 to provide a sworn declaration identifying what, if any, missing
9 documents he previously received from his attorneys, as the State
10 should not have to bear the burden of producing documents that were
11 lost through petitioner's own neglect.

12 Petitioner's counsel responds that she engaged in a months-long
13 exchange with all five of petitioner's prior attorneys in an effort
14 to obtain the files and - based on their responses - believes they
15 have nothing more to provide. Counsel further argues that there is no
16 indication petitioner has ever been in possession of any documents
17 from his file.

18 "A habeas petitioner does not enjoy the presumptive entitlement
19 to discovery of a traditional civil litigant." *Rich v. Calderon*, 187
20 F.3d 1064, 1068 (9th Cir. 1999) (citing *Bracy*, *Bracy v. Gramley*, 520
21 U.S. 899, 903-05). Discovery in habeas matters is governed by Rule 6
22 of the Rules Governing Section 2254 Cases in the United States
23 District Courts, which states: "A party shall be entitled to invoke
24 the processes of discovery available under the Federal Rules of Civil
25 Procedure if, and to the extent that, the judge in the exercise of his
26 discretion and for good cause shown grants leave to do so, but not
27 otherwise."

28 The Supreme Court has construed Rule 6, holding that if through

1 "specific allegations before the court," the petitioner can "show
2 reason to believe that the petitioner may, if the facts are fully
3 developed, be able to demonstrate that he is . . . entitled to relief,
4 it is the duty of the court to provide the necessary facilities and
5 procedures for an adequate inquiry." *Bracy*, 520 U.S. at 908-09
6 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). This inquiry is
7 informed by the essential elements of the claims for which petitioner
8 seeks discovery. *Id.* at 904. Thus, the purpose of discovery in a
9 habeas proceeding is not to develop new claims, but, rather, to
10 develop factual support for specific allegations contained in existing
11 claims. See also *Rich*, 187 F.3d at 1067 ("Habeas is an important
12 safeguard whose goal is to correct real and obvious wrongs. It was
13 never meant to be a fishing expedition for habeas petitioners to
14 'explore their case in search of its existence.'"). Moreover,
15 additional factors may influence whether the court grants leave to
16 conduct discovery. See, e.g., *Sherman v. McDaniel*, 333 F. Supp. 2d
17 960, 969 (D. Nev. 2004) (noting that the court, in exercising its
18 discretion under Rule 6, should take into consideration whether the
19 claims to which petitioner's proposed discovery relates are exhausted
20 in state court).

21 Having considered the parties' arguments and the petition in this
22 case, the court finds good cause to grant petitioner's essentially
23 unopposed discovery request. In review of the petitioner's assertion
24 that his prior attorneys do not have any materials that have not
25 already been turned over, the court concludes it would unnecessarily
26 delay litigation of this case to require petitioner to first subpoena
27 his prior attorneys. The court declines to compel petitioner to submit
28 a sworn declaration as requested by respondents, as the court accepts

1 counsel's representation that petitioner is not in possession of the
2 materials requested in this proceeding.

3 The court therefore grants petitioner leave to issue subpoenas
4 to the Washoe County District Attorney's Office in order to obtain any
5 and all materials that were previously disclosed to the defense before
6 and during petitioner's trial to the extent these materials are still
7 in the possession of the District Attorney's office, specifically:

- 8 1. All the police reports, including witness identifying
9 information and statements (audio or written), arrest
10 reports, crime reports, officer reports, evidence impound
11 reports, and photographs;
- 12 2. All witness identifying information and statements relating
13 to the prior bad act rebuttal evidence that was introduced
14 at trial;
- 15 3. Medicals records of the victims, including autopsy reports;
- 16 4. All firearm and ballistics reports;
- 17 5. All crime lab reports;
- 18 6. All expert witness reports;
- 19 7. Any and all correspondence, including e-mails, between the
20 prosecuting and defense attorneys at trial, including but
21 not limited to plea negotiations and the disclosure of
22 pre-trial discovery;
- 23 8. Records pertaining to plea negotiations of petitioner's
24 co-defendant, Saili Manu.

25 Accordingly, IT IS THEREFORE ORDERED that petitioner's motion for
26 discovery (ECF No. 20) is GRANTED, such that petitioner may pursue the
27 discovery hereinabove set forth, without the necessity of prior court
28 approval of the subpoenas served to obtain the discovery approved by

1 this order.

2 IT IS FURTHER ORDERED that the certification requirements of
3 Rules 26(c)(1) and 37(a)(1) of the Federal Rules of Civil Procedure
4 and Local Rule LR 26-7 apply to any and all disputes with regard to
5 the discovery allowed herein. The parties and any non-parties served
6 shall confer and endeavor in good faith to resolve any and all
7 discovery disputes in this regard, and they shall seek court
8 intervention only as a last resort. All applicable discovery sanction
9 provisions of Rules 26 through 37 further shall apply. Any and all
10 discovery matters in this habeas case, including any emergency
11 discovery disputes under Local Rule LR 26-7(c), will be handled in
12 this case by the Presiding District Judge rather than the Magistrate
13 Judge.

14 IT IS FURTHER ORDERED that petitioner shall have ninety (90) days
15 from entry of this order to complete the discovery authorized by this
16 order.

17 IT IS FURTHER ORDERED that petitioner shall have one hundred
18 twenty (120) days from entry of this order to file, along with any
19 requests for other appropriate relief, either: (a) an amended petition
20 taking into account the facts developed in the discovery; or (b) a
21 notice that petitioner will not be seeking to amend the petition at
22 that juncture. Neither the foregoing deadline nor any extension
23 thereof signifies or will signify any implied finding as to the
24 expiration of the federal limitation period and/or of a basis for
25 tolling during the time period established. Petitioner at all times
26 remains responsible for calculating the running of the federal
27 limitation period and timely asserting claims, without regard to any
28 deadlines established or extensions granted herein. That is, by

1 setting a deadline to amend the petition and/or by granting any
2 extension thereof, the court makes no finding or representation that
3 the petition, any amendments thereto, and/or any claims contained
4 therein are not subject to dismissal as untimely. See *Sossa v. Diaz*,
5 729 F.3d 1225, 1235 (9th Cir. 2013).

6 IT IS FURTHER ORDERED that respondents' motion to delay filing
7 of an answer or other response to the first amended petition (ECF No.
8 23) is GRANTED. Respondents shall have thirty (30) days from service
9 of a second amended petition or notice that petitioner will not amend
10 his petition to respond to the operative petition.

11 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days
12 from service of the response to the petition to file an opposition to
13 a motion to dismiss or a reply to an answer.

14 IT IS FURTHER ORDERED that any procedural defenses raised by
15 respondents to the petition shall be raised together in a single
16 consolidated motion to dismiss. Procedural defenses omitted from such
17 motion to dismiss will be subject to potential waiver. Respondents
18 shall not file a response in this case that consolidates their
19 procedural defenses, if any, with their response on the merits, except
20 pursuant to 28 U.S.C. § 2254(b)(2) as to any unexhausted claims
21 clearly lacking merit. If respondents do seek dismissal of unexhausted
22 claims under § 2254(b)(2): (a) they shall do so within the single
23 motion to dismiss not in the answer; and (b) they shall specifically
24 direct their argument to the standard for dismissal under § 2254(b)(2)
25 set forth in *Cassett v. Stewart*, 406 F.3d 614, 623 24 (9th Cir. 2005).
26 In short, no procedural defenses, including exhaustion, shall be
27 included with the merits in an answer. All procedural defenses,
28 including exhaustion, instead must be raised by motion to dismiss.

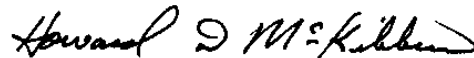
1 IT FURTHER IS ORDERED that, in any answer filed on the merits,
2 respondents shall specifically cite to and address the applicable
3 state court written decision and state court record materials, if any,
4 regarding each claim within the response as to that claim.

5 IT FURTHER IS ORDERED that any state court record and related
6 exhibits filed herein by either petitioner or respondents shall be
7 filed with a separate index of exhibits identifying the exhibits by
8 number. The CM/ECF attachments that are filed further shall be
9 identified by the number or numbers of the exhibits in the attachment.
10 If the exhibits filed will span more than one ECF Number in the
11 record, the first document under each successive ECF Number shall be
12 either another copy of the index, a volume cover page, or some other
13 document serving as a filler, so that each exhibit under the ECF
14 Number thereafter will be listed under an attachment number (i.e.,
15 Attachment 1, 2, etc.).

16 IT FURTHER IS ORDERED that the hard copy of any exhibits filed
17 by either counsel shall be delivered - for this case - to the Reno
18 Clerk's Office.

19 IT IS SO ORDERED.

20 DATED: This 9th day of May, 2018.

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23 HOWARD D. MCKIBBEN
24 UNITED STATES DISTRICT JUDGE
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